MESSRS TAI CHOI YU & CO, ADVOCATES v. THE COURT OF APPEAL & ORS

HIGH COURT SABAH & SARAWAK, MIRI
LEE HENG CHEONG J
[SUIT NO: MYY-22NCVC-14-8-2015(HC)]
31 MAY 2016

CIVIL PROCEDURE: *Affidavits – Affidavit in support of application – Failure to file affidavit in opposition – Averment and assertion in affidavit in support – Whether deemed admitted*

CONSTITUTIONAL LAW: *Attorney General – Representation – Civil suit against Court of Appeal Judges – Whether judges sued in personal or official capacity – Whether acts committed by judges while performing functions established under Federal Constitution – Whether Attorney General legally bound to represent judges – Federal Constitution, art. 145*

The plaintiff's appeal was struck out by an order of the Court of Appeal ('Court of Appeal order') on 14 August 2014. Dissatisfied by the said Court of Appeal order, the plaintiff applied for leave to appeal to the Federal Court but the Federal Court refused the plaintiff's leave to appeal against the said decision of the Court of Appeal. As such, the plaintiff sought, amongst others, a declaration that the Court of Appeal order was a nullity, null and void or *void ab initio* on the ground, *inter alia*, that it was unlawful being a deprivation or denial of access to the courts. The first defendant was the Court of Appeal and the second and third defendants were two of the three judges in the panel of the Court of Appeal which gave the said Court of Appeal order. Enclosure 6 was an application by the plaintiff for an order that the defendants' memorandum of appearance filed by the Federal Attorney General's Chambers be set aside and/or struck off or that the purported representation of the defendants by the Federal Attorney General's Chambers be struck out or deleted under O. 18 r. 19 of the Rules of Court 2012 ('ROC 2012') and inherent jurisdiction on the grounds, *inter alia*, that (i) the first defendant was an independent arm established under the Constitution on the principle of separation of powers and therefore the representation by the Federal Attorney General's Chambers was unlawful, illegal and unconstitutional; and (ii) the second and third defendants hold office under contract in their personal capacities and were sued in their personal capacities and therefore they could not be represented by the Federal Attorney General's Chambers. Relying on the case of *Ng Hee Thoong v. Public Bank Bhd*, the plaintiff contended that since the defendants did not file any affidavit in opposition to encl. 6, all matters deposed by the plaintiff in affidavit in support of encl. 6 was deemed admitted by the defendants.

Held (dismissing encl. 6 with costs):

(1) The principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is 'usually' treated as an admission by him of the fact so asserted *(Ng Hee Thoong & Anor v. Public Bank Bhd)*. The material word stated is 'usually' and not 'always'. From the perspective of evaluation of affidavit evidence, a positive assertion must be a positive assertion with cogent evidence and not a pure assertion, without anything concrete to substantiate. On the facts, the plaintiff failed to prove that his averments supported the grounds relied by him in encl. 6 and that the affidavit in support merely repeated the grounds of the application without furnishing any concrete evidence. In the premises, the plaintiff's contention was without merits. (paras 9, 10 & 14)

(2) In the statement of claim, the plaintiff sued the second and third defendants as judges of the first defendant and not in their personal and/or private capacity. Article 145 of the Federal Constitution grants ample power to the Attorney General to represent the Government and anybody or person performing any functions under the Constitution. Therefore, Attorney General is under a mandatory duty to provide the defendants with legal representation. (paras 16, 17 & 18)

(3) The acts committed by the second and third defendants were in the course of hearing the appeal which was a judicial proceeding and it was in the course of their work in relation to the office which is established under the Federal Constitution. The Attorney General being an officer established under the Federal Constitution and the Government Proceedings Act 1956, had properly stepped in and defended the defendants, not as a private individual but in the protection of such offices and/or the institution of the judiciary and in the interest of the administration of justice. (para 21)

(4) There were no merits in the plaintiff's contentions that the representation by the Federal Attorney General Chamber's representation of the second and third defendants was an abuse and/or that the Attorney General Chambers had no power or jurisdiction to represent the second and third defendants to commence or institute a civil action in court in the name and personal capacity of a judge of the Court of Appeal. (para 22)

Case(s) referred to:

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt [2007] 4 CLJ 613 CA ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Azimuddin Ab Ghani & Ors [2012] 1 CLJ 522 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 125(3), 145
Rules of Court 2012, O. 18 r. 19

For the plaintiff - Tai Choi Yu; M/s Tai Choi Yu & Co Advocs
For the defendants - Shamsul Bolhassan; SFC

Reported by Sandra Gabriel

JUDGMENT

Lee Heng Cheong J:

Introduction

[1] Enclosure 6 is an application by the plaintiff for an order that the defendants' memorandum of appearance filed by the Federal Attorney-General's Chambers be set aside and/or struck off or that the purported representation of the defendants by the Federal Attorney General's Chambers be struck out or deleted under O. 18 r. 19 of the Rules of Court 2012 ("ROC 2012") and inherent jurisdiction.

[2] The grounds of the above notice of application are:

(i) that the first defendant is an independent arm established under the Constitution on the principle of separation of powers of (1) the legislative, (2) the judiciary and (3) the executive and therefore the representation by the Federal Attorney General's Chambers is unlawful, illegal and unconstitutional;

(ii) that the second and third defendants are not public servants or public employees and they do not come under the cognisance of the Public Services Commission and the Rules and Regulations thereto;

(iii) the second and third defendants hold office under contract in their personal capacities and are sued in their personal capacities and therefore they cannot be represented by the Federal Attorney General's Chambers; and

(iv) being independent contractees, the second and third defendants will be beholden or seen to be beholden to the executive arm of the Government of Malaysia if so represented and therefore the second and third defendants representation by the Federal Attorney is a nullity, null and void and *ultra vires* the Constitution and not in accordance with the law.

A **Background**

[3] In his statement of claim, the plaintiff claims for the following orders and reliefs:

(i) an order that High Court Suit No. MYY-22-157-2013 be reinstated and
B to be reverted back to the High Court for hearing on its merits and on *quantum meruit* or on such terms as the High Court deems fit and just;

(ii) a declaration that the said order dated 14 August 2014 in the Court of Appeal Civil Appeal No. Q-02(IM)-188-01-2014 is a nullity, null and void or void *ab initio* on the ground that it is unlawful being a
C deprivation or denial of access to the courts, illegal and against public policy and is *ultra vires* the Constitution, arbitrary and oppressive and a gross miscarriage of justice or in breach of established elementary rules of natural justice and further, with no reason given and without the written grounds of decision;

D (iii) A declaration that the second defendant acted in bad faith or was reckless or did not in good faith believe that she had jurisdiction to grant the said order with no reason or grounds of decision given or for her refusal and inability to furnish the grounds of decision;

E (iv) A declaration that the third defendant acted in bad faith or was reckless or did not in good faith believe that she had jurisdiction to grant the said order with no reason or grounds of decision given or for her refusal and inability to furnish the grounds of decision; and

(v) A declaration that the second and third defendants are unfit to be judges
F on the grounds of bad faith, recklessness or absence of good faith and for their refusal to discharge their duties to give reasons or to furnish their reasoned judgment for the said order.

[4] The plaintiff's claim herein arose out of a matter in which he was the plaintiff in Miri High Court Suit No. MYY-22-15-7-2013 ("the said 2013
G suit") between his law firm, *Tai Choi Yu & Co Advocates v. Ting Sie Chung @ Ting Sieh Chung* and his appeal to the Court of Appeal, was struck out by an order of the Court of Appeal ("the said Court of Appeal order') in Civil Appeal No. Q-02(IM)-188-01-2014 on 14 August 2014.

[5] The said Court of Appeal reversed the High Court's decision whereby
H the defendant/appellant's interlocutory notice of application (encl. 32) in the said 2013 suit, was dismissed by the High Court.

[6] Dissatisfied by the said Court of Appeal order, the plaintiff applied for leave to appeal to the Federal Court in Application No. 08(i)-499-09-2014(Q) and on 21 May 2015, the Federal Court refused the plaintiff's leave
I to appeal against the said decision of the Court of Appeal.

[7] The first defendant is the Court of Appeal established under the Federal Constitution and the laws of Malaysia and the second and third defendants are two of the three judges in the panel of the Court of Appeal of Civil Appeal No. Q-02(IM)-188-01-2014 which gave the said order, the second defendant being the presiding judge and the third judge of the said panel was Dato' Hj Mohd Zawawi bin Salleh.

Consideration Of The Notice Of Application (Encl. 6)

[8] The plaintiff contended that since the defendants did not file any affidavit in opposition to the plaintiff's application (encl. 6) herein, all matters deposed by the plaintiff in the affidavit in support (encl. 7) are deemed admitted by the defendants and relied on the Court of Appeal case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 that all the matters deposed in encl. 7 are deemed admitted by the defendants and on this ground alone the plaintiff's application (encl. 6) must be allowed and that encl. 2 be set aside or struck out or that the current counsel be barred and ordered to discontinue to act as counsel for the defendants and to direct the defendants to appoint an advocate to act as their counsel in accordance with the law and in compliance of the laws of Sarawak especially the Advocate Ordinance Sarawak (Cap. 110).

[9] This court finds that there are merits in the defendants' contention that the material word stated in the judgment of Court of Appeal case of *Ng Hee Thoong & Anor v. Public Bank Bhd*, *supra* is 'usually' and not 'always'. At p. 614 (CLJ), Gopal Sri Ram JCA (as he then was) propounded the following principle:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is **usually** treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. O'Brien* [1988] 3 MLJ 332. (emphasis added)

[10] Thus from the perspective of evaluation of affidavit evidence, a positive assertion must be a positive assertion with cogent evidence and not a pure assertion, without anything concrete to substantiate. This court is guided by *Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt* [2007] 4 CLJ 613; [2007] 5 MLJ 250 where the Court of Appeal in allowing the appeal held that:

> (1) (per James Foong JCA) When the application for striking out ought to be dismissed *in limine*, the failure of the appellant to file an affidavit in rebuttal to the averments of the respondent was irrelevant. The stage for the consideration of this had not arrived. *The respondent must first prove to the court that his averment supports the grounds relied on by him for striking out. Failure to satisfy this preliminary step would result in the dismissal of the application without the need to consider other matters* (see para 16).

A (2) (per James Foong JCA) The second and third averments of the respondent could be condensed into an assertion that the appellant had no legal right to claim against the respondent. **But this assertion, standing on its own without any qualification and explanation was just a bare statement**. ...

B **[11]** At p. 623 (CLJ); p. 257 (MLJ) of the same case, James Foong JCA further held as follows:

[14] **It is not in dispute that the appellant did not file any affidavit to rebut the allegations** of the respondent listed in the respondent's affidavit filed in support of the application. Indeed, it is well established that in C evaluating evidence tendered through affidavit it is necessary where one party makes a positive assertion upon a material issue it is for his opponent to contradict it otherwise it will be treated as an admission by his opponent of the fact so asserted – see *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332; *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Ng Hee Thoong & Anor v.* D *Public Bank Bhd* [1995] 1 MLJ 281; *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533. But is this fatal to the appellant in this instant application?

[15] It is my view that this depends on the nature of the application. *A perusal of the application will reveal that the application is grounded on two* E *grounds: (a) the appellant's claim is frivolous and; (b) it is otherwise an abuse of the court's process. These would fall within O. 14 r. 21(b) and (d) of the ('SCR'). When the application is confined to these two grounds then it is necessary to examine the contents of the respondent's affidavit to determine whether they support the grounds mentioned*.

[16] *The respondent's said affidavit contains principally three averments: (a) that* F *the appellant did not provide the said services to the respondent's premises and that the respondent has no contractual relationship with the appellant; (b) that the respondent has been advised by his solicitors that the appellant has no basis in law to claim from the respondent and; (c) the respondent was further advised by his solicitors that the appellant does not possess any right to claim from him*. I shall G first consider the first averment. Basically it boils down to a contention that since the appellant did not provide the said services to the respondent there is no contractual relationship between the parties. When there is no contractual relationship between the parties there can be no cause of action founded on contract. *It is my view that if the appellant has no cause of action against the, respondent then the appropriate and proper ground for striking* H *out is O. 14 r. 21(1)(a) SCR which says: 'it discloses no reasonable cause of action or defence, as the case may be'. This averment certainly does not support the grounds that the appellant's claim is frivolous (as provided for under O. 14 r. 21(1)(b) of the SCR), and an abuse the court's process (under O. 14 r. 21(1)(d) of the SCR). To be frivolous, the claim must be paltry or lacking in seriousness. Judging from the contents of the statement of claim, I doubt that the appellant is not serious in pursuing* I *this claim or lack any basis in doing so. And neither could it be said that the appellant has abused the court's process. The appellant as a corporate entity has every right to bring a claim against the defendant for the said services it claimed to have provided the respondent. When it is the respondent's contention that this claim*

ought to be struck out for disclosing no cause of action then the respondent must state the correct ground provided under O. 14 r. 21(1) of the SCR rather than using those which are inappropriate and improper where the reason proffered does not justify or support them. When the reason fails to justify or support the grounds relied on then the application ought to be dismissed – see *Ronex Properties Ltd v. John Laing Construction Ltd* [1983] 1 QB 398 which is cited locally in *Perwira Affin Bank Bhd v. Ahmad bin Abdul Rahman* [1999] 5 MLJ 306. When the application for striking out ought to be dismissed *in limine*, the failure of the appellant to file an affidavit in rebuttal to the averments of the respondent is irrelevant. The stage for the consideration of this has not arrived. **The respondent must first prove to the court that his averment supports the grounds relied on by him for striking out. Failure to satisfy this preliminary step would result in the dismissal of the application without the need to consider other matters**. (emphasis added)

[12] Further support can be found in the judgment of Justice Zaleha Zahari JCA (as she then was) in the case of *Ng Hee Thoong supra*, at para. 30, where she held *inter alia* as follows:

[30] As to the application of *Ng Hee Thoong* where it was held that, in evaluating affidavit evidence where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted, that case relates to the challenge to the service of the notice of demand which was a *sine qua non* of the foundation of legal liability under the guarantee and the respondent's failure to explain why it had sent the notice to an address other than that which appeared on the guarantee. The court then held, whether the demand was ever made and received was one that had to be resolved at trial. *Cognizance must necessarily be given to the usage of the word 'usually' in the judgment, that there may well be situations where it cannot and should not be applied. In my view this is one such case. Consideration must be given to the fact the affidavit in issue in this case merely repeats the contentions in the defence.*" (emphasis added)

[13] In *Lembaga Kumpulan Wang Simpanan Pekerja v. Azimuddin Ab Ghani & Ors* [2012] 1 CLJ 522; [2011] MLJU 234, Justice Lee Swee Seng JC (as he was then) held as follows:

It must be noted that the word used is **'usually' and not 'always'** and rightly so. **In the context of evaluation of affidavit evidence, it goes without saying that the positive assertion must be a positive assertion with cogent evidence and not a pure contradiction with nothing concrete to substantiate**. If it is the latter, the Court may not be minded to find that the averment of a Plaintiff has been displaced and disproved by a mere positive assertion of a Defendant. (emphasis added)

[14] Applying the principles laid down in the above authorities, this court finds that the plaintiff failed to prove that his averments support the grounds relied by him in encl. 6 and that the affidavit in support merely repeated the grounds of the application without furnishing any concrete evidence. In the premises this court finds that the plaintiff's above contention is without merits.

A **Whether The Second And Third Defendants Can Be Represented By The Federal Attorney-General's Chambers**

[15] The plaintiff's pleaded case are as follows:

(i) Paragraph 2 of the Statement of Claim [enclosure 1]

B 2. *The 1st Defendant is the Court of Appeal established under the Federal Constitution and the laws of Malaysia and the 2nd and 3rd Defendants are two (2) of the three (3) judges in the panel of the Court of Appeal of Civil Appeal No. Q-02(IM)-188-01-2014 which gave the said Order, the 2nd Defendant being the presiding judge* and the 3rd judge of the said panel was Dato' Hj Mohd Zawawi bin Salleh.

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(ii) Paragraph 24 (5) of the Statement of Claim [enclosure 1]

24. WHEREFORE the Plaintiff claims for the following reliefs:

(1) .....

D (2) .....

.....

(5) **A declaration the 2nd and 3rd Defendants are unfit to be judges** on the grounds of bad faith, recklessness or absence of good faith and for their refusal to discharge their duties to give E reasons or to furnish their reasoned Judgement for the said Order. (emphasis added)

[16] From the pleadings, this court finds that at the material time, the second and third defendants were among the two judges on the panel hearing the appeal in which the plaintiff's 2013 suit between *Tai Choi Yu & Co. Advocates v. Ting Sie Chung @ Ting Sieh Chung*, was struck out by the first F defendant *vide* Court of Appeal Civil Appeal No. Q-02. In the statement of claim herein, in particular paras. 2 and 24, the plaintiff sued the second and third defendants as judges of the first defendant and not in their personal and/ or private capacity.

G **[17]** This court holds that the Attorney General was under a mandatory duty to provide the defendants with legal representation in order to defend and protect the office and institution of the administration of justice in Malaysia.

H **[18]** This court finds support in *Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294; [1988] 3 MLJ 149 where Tun Haji Mohamed Salleh Abas sought to strike out the notice of motion of the Attorney General as the tribunal constituted under art. 125(3) of the Federal Constitution is intended to be independent of the Government and thus the Attorney General is not entitled I to represent the members of the tribunal. The court held *inter alia* that the Attorney General is a public officer under the Constitution and he was required by the rules of procedure of the tribunal to assist the tribunal.

Article 145 of the Federal Constitution grants ample power to the Attorney General to represent the Government and anybody or person performing any functions under the Constitution.

[19] Further support can be found in *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11, where the plaintiffs there applied to prevent the Attorney General or his officers from acting for the first defendant and it was dismissed with costs. The Court of Appeal there held as follows:

> (1) At the material time the first defendant was a judge of the Kuala Lumpur High Court as well as the head of civil division having charge of all matters pertaining to the execution of assets in Kuala Lumpur, including writs of seizure and sale. In the title to the action, and para 2(a) and (b) of the plaintiffs' statement of claim, the plaintiffs had sued the first defendant as a judge of the High Court. The plaintiffs were bound by their own pleadings. There was no question of the first defendant having been sued in his personal or private capacity (see para 18); **Decision Regarding Counsel for Christopher Fernando's Objection to the Attorney General's Application to Represent Dato' Augustine Paul** [2002] 2 AMR 2357 followed.
>
> (2) *The Attorney General was under a mandatory duty to provide the first defendant with legal representation in order to defend and protect the office and institution of the administration of justice in Malaysia (see para 21); Tun Dato' Haji Mohamed Salleh bin Abas v. Tan Sri Dato Abdul Hamid bin Haji Omar & Ors [1988] 3 MLJ 149 and Malaysian Bar v. Tan Sri Dato Abdul Hamid [1989] 2 MLJ 281 followed*. In the absence of particulars to substantiate them, there were no legal or factual impediment to the Attorney General and his officer providing legal representation to the first defendant. The court below had correctly held that the Attorney General and his legal officers were legally bound to represent the first defendant (see paras28–29).
>
> (emphasis added)

[20] Further down at pp. 665-666 (CLJ); pp. 21-22 (MLJ), His Lordship Low Hop Bing (JCA) held as follows:

> [22] A similar sentiment was expressed in *Dato Augustine Paul*. There, defence counsel Mr Christopher Fernando applied to commit Augustine Paul J (now FCJ) for contempt for words uttered by the judge in the course of a criminal trial. There was an objection to the Attorney General's application to represent the judge. Hashim Yusoff J (now FCJ) held that the words were uttered in the course of proceedings in the criminal trial. It was in the course of his work in relation to the office which is established under the Federal Constitution. The Attorney General being an officer established under the Federal Constitution and the Government Proceedings Act 1956 must properly step in and defend the judge not as a private individual but in the protection of such office, the institution of the judiciary and in the interest of the administration of justice in Malaysia.

A [23] The issue of legal representation was less problematic in *Malaysian Bar v. Tan Sri Dato Abdul Hamid* [1989] 2 MLJ 281 (SC). There, the Malaysian Bar sought leave to apply for committal order against Tan Sri Dato (now Tun) Abdul Hamid bin Omar for alleged contempt of court on the alleged ground of attempting to prevent, frustrate and interfere with the sitting of the then Supreme Court, when holding the office of
B the Acting Lord President thereof. At the hearing of that application, in the absence of any objection, the Attorney General and his officer had no difficulty. Hence, it is submitted that the Defendants have successfully established that the plaintiffs' statement of claim is devoid of any reasonable cause of action.

C **[21]** This court finds that it is clear that the acts committed by the second and third defendants were in the course of hearing the appeal which is a judicial proceeding and it was in the course of their work in relation to the office which is established under the Federal Constitution. The Attorney General being an officer established under the Federal Constitution and the
D Government Proceedings Act 1956, had properly step in and defend the defendants, not as a private individual but in the protection of such offices and/or the institution of the judiciary and in the interest of the administration of justice in Malaysia.

[22] In light of this court's above findings, this court finds that there are
E no merits in the plaintiff's contentions that the Federal Attorney General Chamber's representation of the second and third defendants is an abuse of public funds and/or that the Attorney General Chambers has no power or jurisdiction to represent the second and third defendants to commence or institute a civil action in court in the name and personal capacity of a judge
F of the Court of Appeal.

Order

[23] In light of this court's above findings, this court finds that there are no merits in encl. 6. In the premises this court dismisses encl. 6 with costs.

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